ORAL ARGUMENT SCHEDULED FOR FEBRUARY 26 & 27, 2001

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Nos. 00-5212, 5213

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MICROSOFT CORPORATION,
Defendant-Appellant,

v.

UNITED STATES OF AMERICA and STATE OF NEW YORK, *et al*.,
Plaintiffs-Appellees

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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**REPLY OF LAURA BENNETT PETERSON
TO MICROSOFT CORPORATION'S RESPONSE
TO MOTIONS FOR LEAVE TO PARTICIPATE AS AMICI CURIAE**

I, Laura Bennett Peterson, an antitrust scholar, attorney, and economist, respectfully submit that Microsoft's above Response to my motion for amicus status is unconvincing for three reasons:

(1) Microsoft cites one case. That case does not support its opposition to my filing of an amicus brief;

(2) There is abundant authority for the Court to permit my filing of such a brief; and

(3) My participation would serve the interests of judicial economy and of justice while imposing a minimal burden on Microsoft.

ARGUMENT

1. The Single Case Microsoft Cites Does Not Support Its Opposition to My Filing of an Amicus Brief.

Microsoft excises a snippet from an opinion by Judge Richard A. Posner to support its opposition to my motion. *See* Microsoft Corporation's Response to Motions for Leave to Participate as *Amici Curiae* ("Microsoft's Response") at 2-3. The opinion, Ryan v. CFTC, 125 F.3d 1062 (7th Cir. 1997) (Posner, C.J., in chambers), offers no such support.

Ryan, the petitioner, was challenging a disciplinary order of the Commodity Futures Trading Commission ("CFTC"). Id. at 1063. The Chicago Board of Trade ("the Board") moved for leave to file an amicus brief in Ryan's support. Judge Posner gave this explanation for his denial of the Board's motion:

> The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse. The term "amicus curiae" means friend of the court, not friend of a party.

Id. The Board's amicus brief, which "echoe[d]" the petitioner's argument, "adds nothing to the already amply proportioned brief of the petitioner." Id. at 1064.

The amicus brief that I seek leave to file would by no means "duplicate" or "echo" the litigants' arguments. It would instead fall into a category of amicus briefs that should, in Judge Posner's view, generally be permitted:

> **An amicus brief should normally be allowed** when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or **when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. . . . We are** not **helped** by an amicus curiae's expression of a "strongly held view" about the weight of the evidence [citation omitted], but **by being pointed to considerations germane to our decision of the appeal that the parties for one reason or another have not brought to our attention.**

Id. at 1063-64 (emphasis added).

I would, more specifically, apply an analytical framework that combines law and economics with a view to assisting the Court in resolving this case. *See* Motion of Laura Bennett Peterson for Leave to File an Amicus Brief ("Peterson Motion") at 1-4. This framework has been developed over many years of study, practice, teaching, and writing in law (particularly antitrust) and economics. *See* Affidavit of Laura Bennett Peterson in Support of Her Motion for Leave to File an Amicus Brief ("Peterson Affidavit") at 1-3. It is a framework that applies economic as well as legal principles in examining challenged business conduct.

Under this framework, the economic purpose and effect of conduct would be analyzed before any legal conclusion is reached. The law would be seen as properly "direct[ing] itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest." Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993).

As this Court noted in United States v. Microsoft Corp., 147 F.3d 935 (D.C. Cir. 1998), the parties cannot be relied on to supply such a framework. *See* id. *at 946-48*. "[B]oth parties' readings [of the consent decree] . . . allow legitimation by behavior that is either irrelevant [to the economic principles of tie-ins] or actively harmful." Id. at 948, quoted in Peterson Motion, supra, at 3. The other amicus movants who press the interests of one or more competitors cannot be expected, for their part, to provide such a framework.

The absence of an appropriate analytical framework is especially unfortunate in a case that presents, as Microsoft acknowledges, "a morass of procedural and substantive issues" on appeal. Jurisdictional Statement filed with the Supreme Court in Microsoft Corp. v. United States, No. 00-139 (July 26, 2000), Part IV (obtained online from www.microsoft.net/presspass/trial/appeals/07-26jurisdictional.asp). The Supreme Court's review would, in Microsoft's words, "be aided immensely by having the court of appeals clear out the procedural and factual underbrush first." Id. at the conclusion of Part II.

A perspective that combines law and economics would assist this Court in clearing out the underbrush. Such a perspective is helpful, if not essential, to an understanding of the mixed questions of fact and law on which this case turns. This perspective could guide the Court in working through the extensive record on appeal, assessing the findings of fact in light of this record, and determining whether the conclusions of law followed from an application of sound antitrust principles to these facts.

My proposed amicus brief does not fit into the category of amicus briefs that Judge Posner condemns. *See* Ryan, supra, at 1063. Despite Microsoft's conclusory assertion that "[n]othing [I] have to say will make a meaningful addition to the parties' presentations on the factual and legal issues," Microsoft's Response at 5, I maintain, for the reasons presented here and in my motion, that I could instead provide a "perspective that can help the court beyond the help that the lawyers for the parties are able to provide." Ryan, supra, at 1063.

2. There Is Abundant Legal Authority for My Filing of an Amicus Brief.

Microsoft hopes that the Court will view its Order of October 10, 2000, denying the *pro se* motion of Roy A. Day for leave to file an amicus brief *in forma pauperis*, as precedent for the denial of my amicus motion, along with the motions of two other individuals. *See* Microsoft's Response at 5. Microsoft summarily asserts: "[E]fforts by organizations or private individuals with no particularized interest in this case (or the software industry generally) to participate as *amici* should simply be denied, regardless of which side they support." Microsoft's Response at 2. What Microsoft means by a "particularized interest" is undefined and unintelligible. *See* id. at 2-3. The support for Microsoft's position in Ryan, the one case it cites, is elusive. *See* the discussion supra. Other legal authorities do not, moreover, advance its case.

"The orthodox view of amicus curiae was, and is, that of an **impartial** friend of the court—**not an adversary party in interest in the litigation**." United States v. Michigan, 940 F.2d 143, 164-65 (6th Cir. 1991) (emphasis in original). *See* Clark v.

Sandusky, 205 F.2d 915, 917 (7th Cir. 1953) ("[a]n *amicus curiae* is 'not a party to the action, but is merely a friend of the court whose sole function is to advise, or make suggestions to, the court.'")

The decision on a motion to file an amicus brief is within the sound discretion of the court. United States v. Michigan, supra, 940 F.2d at 165; Clark v. Sandusky, supra, 205 F.2d at 917; Ellsworth Associates v. United States, 917 F. Supp. 841, 846 (D.D.C. 1996) (Richey, J.) and cases cited therein. In exercising this discretion, the court considers whether "the information offered [by the amicus] is 'timely and useful.'" Ellsworth Associates, supra, at 846 (citing Waste Management of Pennsylvania v. City of York, 162 F.R.D. 34, 36 (M.D.Pa.1995), quoting Yip v. Pagano, 606 F. Supp. 1566, 1568 (D.N.J. 1985), *aff'd*, 782 F.2d 1033 (3rd Cir.), *cert. denied*, 476 U.S. 1141 (1986)). According to Professor Michael Tigar, "**[e]ven when the other side refuses to consent to an amicus filing, most courts of appeals freely grant leave to file, provided the brief is timely and well-reasoned.**" Michael E. Tigar & Jane B. Tigar, Federal Appeals: Jurisdiction and Practice, at 181 (3d ed. 1999) (emphasis added).

One of the classic functions of an amicus is to supplement the efforts of the parties' counsel. Miller-Wohl Co. v. Commissioner of Labor and Indus., 694 F.2d 203, 204 (9th Cir. 1982). "**An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court**." Advisory Committee Note, 1988 Amendments to F. R. App. P. 29(b)(2) (providing that the motion must state "the reason why an amicus brief is desirable and why the matters asserted are relevant to the

disposition of the case"), quoted in 16A Charles Alan Wright *et al*., Federal Practice and Procedure Section 3975, at 541 n.7 (1999) (emphasis added). Another function of an amicus is to "insur[e] a complete and plenary presentation of difficult issues so that the court may reach a proper decision." United States v. Gotti, 755 F. Supp. 1157, 1158 (E.D.N.Y. 1991).

My amicus brief would, for the reasons given in Part 1 above, as well as in the Peterson Motion at 1-4, fulfill these functions.

3. My participation as an amicus would serve the interests of judicial economy and of justice while imposing a minimal burden on Microsoft.

Microsoft seeks, through its Response, to have the Court revisit the rejection, in its Order of October 11, 2000, of Microsoft's earlier suggestion that there be a limit of one amicus brief per side. *See* Microsoft's Response at 2; Microsoft's Motion for an Order Governing Further Proceedings at 2 n.2. Microsoft claims that multiple briefs by amici who represent its competitors "would be unfair to Microsoft and unduly burdensome for the Court." Response, supra, at 2. It makes no such claim with respect to the motions of the three individuals, concluding, without elaboration, that they "should simply be denied, regardless of which side they support." Id.

Even if Microsoft were to have made a claim of unfair burden from my filing of an amicus brief, the provisions of Rule 29 of the Federal Rules of Appellate Procedure, this Circuit's Rule 29, and the October 11 scheduling order (limiting amicus briefs to 25 pages), ensure that any burden on Microsoft would be minimal. Given the exceptional importance of this case and the already stringent limitation on the size of any amicus

brief, the opportunity for amici to demonstrate, if appropriate, the impracticability of joining in a single brief should be preserved.

My perspective as an antitrust scholar, attorney, and economist should, for the reasons set forth herein and in my motion, assist rather than burden the Court. As Microsoft itself argued before the Supreme Court: "'The need for soundness in the result outweighs the need for speed in reaching it.' . . . The issues raised by these appeals . . . deserve 'all of the wisdom that our judicial process makes available.'" Reply Brief filed with the Supreme Court in Microsoft Corp. v. United States, No. 00-139 (Aug. 22, 2000) (obtained online through www.microsoft.net/presspass/trial/appeals/08-22screply.asp) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 937, 938 (1952)).

CONCLUSION

For the foregoing reasons, together with the reasons presented in my motion, I respectfully ask the Court to grant my Motion for Leave to File an Amicus Brief.

Respectfully submitted,

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November 1, 2000